No. 72-1649

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

GEORGE WESTERBERG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT, AND THE HONORABLE NEAL HORAN AND THE STATE GRAND JURY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado, entered in the above-entitled original proceeding on February 20, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Colorado (Appendix B, *infra*, pp. 2a-5a) is not yet officially reported, but is unofficially reported at 506 P.2d 746.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado (Appendix A, *infra,* p. 1a) was entered on February 20, 1973. A timely petition for rehearing was denied on March 12, 1973 (Appendix C, *infra,* p. 6a), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether state grand jury witnesses (for whom the government obtained transactional immunity) are entitled to invoke the exclusionary rule formulated under the Fourth and Fourteenth Amendments to the United States Constitution by moving to suppress wiretapping evidence intended for use in questioning them before the grand jury, on the ground that the evidence was the product of illegal searches and seizures.[1]

2. Whether, if such witnesses are not entitled to invoke the exclusionary rule, they, at least, are entitled to assert their rights under the Fourth and Fourteenth Amendments by seeking a judicial order, without becoming subject to contempt proceedings, a) permitting them to refuse to answer grand jury questions which are based on such illegal searches and seizures, or, at a minimum, b) making available to them the record (or portions thereof) in the wiretap authorization case which would allow them more effectively to choose—upon advice of counsel—between testifying and being cited for contempt.

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[1] This question substantially conforms to the question framed by the Solicitor General in the petition for a writ of certiorari in *United States* v. *John P. Calandra,* No. 72-734, *certiorari granted* February 20, 1973.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On May 1, 1972, a State Grand Jury was impaneled by the Honorable Neal Horan, Chief Judge of the District Court in and for the Second Judicial District, State of Colorado (R. 23; Appendix D, *infra,* p. 13a).[2] Petitioner Westerberg and various other witnesses were subpoenaed to appear and testify before this grand jury on May 10, 1972 (R. 8).

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[2] "R." refers to the certified record in this original proceeding in the Supreme Court of the State of Colorado, which is being lodged with the Clerk of this Court. Appendix D ("App. D"), *infra,* contains a copy of pertinent pleadings and other papers in prior and related proceedings before the Supreme Court of the State of Colorado, Justice James K. Groves thereof, and the District Court in and for the Second Judicial District. (Such latter Court is also referred to in the record as the District Court in and for the City and County of Denver (compare the R. and App. references above).)

Previously, by order of Colorado Supreme Court Justice James K. Groves, dated April 14, 1971, Westerberg and two of the other subpoenaed witnessed had been provided the statutorily-required notice that 1) upon the application of the State Attorney General, Justice Groves had issued an electronic surveillance order which was in effect for a period of 30 days commencing on January 6, 1971, and thereafter, had issued an extension order for electronic surveillance which was in effect for a period of 30 days; and 2) telephonic communications had been intercepted during the period January 18, 1971—March 7, 1971 (App. D, *infra*, pp. 7a-8a).

On or about May 10, 1972, and prior to their appearance before the grand jury, Westerberg and 13 other subpoenaed witnesses[3] filed a motion in the District Court in and for the Second Judicial District (hereinafter, "District Court") for an order suppressing evidence obtained by electronic surveillance, prohibiting the State Attorney General from disclosing the contents of such surveillance to the grand jury, and from questioning any of them based upon such evidence (R. 8.), all on the ground, *inter alia*, that the electronic

[3] The 13 other movants included Anthony Mulligan, who had been one of the specified recipients of Justice Grove's April 14, 1971 statutory notice; each of the movants alleged that he had been engaged in telephone conversations during the period and on the telephones specified in Justice Grove's notice and, therefore, had reason to believe that his communications had been intercepted and recorded without his knowledge or consent (App. D, *infra*, p. 10a, para. 4). At a hearing on the motion, the Attorney General stipulated that during the period of the interception, communications of movants Westerberg, Mulligan, Van Portfliet and Nelson were in fact overheard, and further represented that he was as yet unable to state whether or not other witnesses had been overheard (R. 8, para. 2; App. D, *infra*, p. 14a, para. 4).

surveillance referred to "violated the rights of each of the above-named witnesses guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States" and "that as witnesses before the Grand Jury, the Petitioners may have no other opportunity to raise the issue of the violation of their Constitutional rights" (App. D, *infra,* pp. 9a-11a, 13a (para. 3); R. 8). A hearing was conducted by Chief Judge Horan on the question of whether the witnesses had standing to challenge the wiretap evidence prior to appearing to testify before the grand jury. Chief Judge Horan ruled that the witnesses had such standing, ordered a hearing to be held on the legality of the electronic surveillance conducted, and further ordered the production of the record in the previously held surveillance authorization proceeding, including the applications for and orders authorizing such surveillance. (R. 9, para. 3; App. D, *infra,* pp. 14a (para. 5), 12a.)

The Attorney General sought relief from the District Court's order by filing in the Supreme Court of the State of Colorado a petition for a writ of prohibition directed against the District Court (App. D, *infra,* pp. 13a-15a). On June 8, 1972, the Colorado Supreme Court issued a show cause order staying further proceedings in the District Court (App. D, *infra,* p. 16a). And on August 28, 1972, the Colorado Supreme Court issued a writ of prohibition, together with an opinion referring to the witnesses' claim "that important Fourth Amendment rights should be promptly vindicated" but concluding that "the witnesses are not entitled to a suppression hearing, and the district court is not to conduct a suppression hearing at this time." *People, ex rel. Dunbar* v. *District Court,* — *Colo.* —, 500 P.2d 819 (App. D, *infra,* pp. 17a-19a). (R. 9, para. 4.)

Subsequent to the Colorado Supreme Court's ruling in *People, ex rel. Dunbar,* Westerberg and the other subpoenaed witnesses sought disclosure of the applications, orders and intercepted conversations by a motion for discovery directed to Justice Groves (App. D, *infra,* pages 20a-23a).[4] By order dated September 22, 1972, Justice Groves denied the motion (R. 16-19).

Thereafter, the witnesses, including Westerberg, were again directed to appear before the grand jury on October 10, 1972. Upon his appearance before the grand jury, each of the witnesses refused to answer questions on the basis of his Fifth Amendment privilege against self-incrimination. In addition, each of the witnesses refused to testify on the ground that the question was based on information obtained in violation of his rights as guaranteed by the Fourth Amendment to the United States Constitution (R. 9, 23). The Attorney General then applied to the District Court for grants of immunity with respect to 13 of the witnesses, including Westerberg. Immunity was granted to each of the witnesses, including Westerberg, on October 24,

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[4] In their Motion, Westerberg, et al., claimed,

> "that if the electronic surveillance conducted by the state was unlawful, either because the order was not properly obtained or because the surveillance was not conducted in accordance with the order, the movants have a right not to be compelled to answer questions based upon information directly or indirectly obtained from such unlawful electronic surveillance, such right being guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States . . . ."

and,

> "that it is impossible for the movants to make an intelligent judgment as to whether the electronic surveillance was valid unless the information sought by them in this motion is made available to them." (App. D, *infra,* p. 22a.)

1972, and the witnesses were ordered to reappear before the grand jury on November 6, 1972. The District Court's "Order Compelling Testimony Pursuant to a Grant of Immunity" expressly refrained from "ruling concerning the refusal of the witnesses to testify on the ground that the questions are based on information obtained in violation of the witness's rights as guaranteed by the *Fourth Amendment* to the Constitution of the United States." (R. 9 (para. 7, 8), 20-25.) (Emphasis added.)

On the date of their reappearance before the grand jury, and prior to any of the witnesses being called to testify, Westerberg filed in the District Court a "Motion For Hearing on Question of Fourth Amendment Violation" wherein he prayed for an order as to whether he would be permitted to refuse to answer grand jury questions based upon the contents of intercepted communications, and the production of the applications and orders which resulted in such interceptions (R. 9-10, 26-27). Based upon the Colorado Supreme Court's ruling in *People ex rel. Dunbar,* the District Court denied the motion, but stayed the witnesses' appearances before the grand jury in order to afford Westerberg an opportunity to seek relief in the State Supreme Court (R. 10 (sic), 31).

On November 9, 1972, Westerberg, individually and on behalf of the other similarly situated subpoenaed witnesses, brought the original proceeding in the Colorado Supreme Court resulting in the judgment, review of which is sought here. In that Court, in his brief, petitioner characterized his action as follows:

> "The Petitioner has before the Court his petition filed in his own behalf and on behalf of others similarly situated requesting the Court to exer-

> cise its supervisory authority over the Respondent Court, and by such action as it may deem appropriate, insure protection of the rights of those concerned as are guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States." (R. 28.)

In his petition, Westerberg requested the Colorado Supreme Court to insure that he "receives a hearing on the question of whether he may be compelled to testify before the State Grand Jury concerning matters arising out of a violation of the Fourth Amendment to the Constitution of the United States" and that he be provided copies of the applications and orders authorizing the electronic surveillance (R. 1). In his petition (R. 1-5) and supporting brief (R. 28-38), Westerberg reviewed the prior and related proceedings in the District Court and the Colorado Supreme Court, as well as before Justice Groves, and stated that the current facts and requested relief were "postured differently" (R. 32) from those involved in *People ex rel. Dunbar,*[5] stating:

> "The witnesses have appeared and refused to testify for reasons predicated [sic] upon their rights under the Fourth and Fifth Amendments to the Constitution of the United States. They have each been granted 'immunity' and directed to reappear before the respondent Grand Jury. Each who persists in refusing to answer questions faces the risk of contempt citations and public proceedings even if the refusal is properly asserted under the Fourth Amendment. The decision whether to invoke a constitutional right must be made without access to information withheld

[5] He reiterated, however, that "if petitioner is entitled to the applications and orders and tapes only at a suppression hearing, then petitioner is entitled to that hearing as well and now." (R. 35.)

> though readily available. A sense of fairness under such circumstances seems obscure at best. The allegations of illegality, though not denied, remain unspecific because the materials from which specifics can be drawn has been denied the witnesses by order of a justice of this Court" (R. 32-33).
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> * * * * * * * * *
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> "The apparent alternative to such a reasonable respect for human rights is to orchestrate a contempt situation. No issue will then be present which is not now before the Court. No useful purpose is to be served by compelling such an unnecessary step." (R. 37-38.)[6]

Following the filing of the petition, and pursuant to order of the court, the Attorney General filed an answer on December 17, 1972 (R. 6, 8-27). Finally, on February 20, 1973, the Colorado Supreme Court issued its order and opinion—the Chief Justice and one other Justice dissenting[6a]—discharging the rule to show cause and denying the relief requested by petitioner, thereby leaving intact the requirement that Westerberg and similarly situated witnesses answer the grand jury's questions, without regard to their Fourth and Fourteenth Amendment claim, or subject themselves

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[6] While petitioner, for the reasons he asserted above, could allege in only conclusory form that electronic surveillance was conducted without benefit of a lawful order, that the applications for such surveillance were insufficient to support a finding of probable cause, that the orders authorizing such surveillance were improper (R. 5), and "that after numerous court proceedings, the Attorney General has not denied the allegations" (R. 4), he did make the specific claim that Justice Groves had no jurisdiction to issue the surveillance order, and, therefore, "in the absence of a lawful order, the wiretapping is as unlawful as any electronic surveillance undertaken in the absence of an order where court approval is required" (R. 4).

[6a] Also, Justice Groves did not participate (R. 44).

to contempt proceedings. (Apps. A, B, *infra,* pp. 1a-5a). The Court squarely faced the federal constitutional question raised by petitioner, stating:

> "The question before us is limited to search and seizure issues under the Fourth Amendment and does not involve self-incrimination under the Fifth Amendment."
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> * * * * * * * * *
>
> "Constitutional issues are before us which involve the balancing of conflicting Constitutional rights and procedures. The petitioners would have us look solely to the Fourth Amendment right of privacy and the right of every person to be protected against unreasonable searches and seizures. The Attorney General points to the function of the grand jury as a charging body and the need to grant the grand jury freedom in its investigation of crime. He contends that to require a suppression hearing when there has been a court-authorized wiretap, before a grand jury witness can be asked a question, would seriously impede the effective use of the grand jury." (App. B, *infra,* pp. 3a, 4a.)

The Colorado Supreme Court, in its opinion, went on to discuss conflicting results which had been reached by two United States Courts of Appeals—*Cali* v. *United States,* 464 F.2d 475 (1st Cir. 1972); *United States* v. *Calandra,* 465 F.2d 1218 (6th Cir. 1972), *certiorari granted* February 20, 1973 (No. 72-734)[7]—and con-

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[7] Referring to the *Calandra* case, the Colorado Supreme Court stated:

> "The Sixth Circuit, however, did not find that a contempt citation was a necessary prerequisite to a right to a hearing on his motion to suppress after he was subpoenaed and claimed that the questions which the grand jury propounded were based upon unlawful electronic surveillance. . . . The Sixth Circuit's opinion is based on the deterrence of unlawful electronic surveillance." (App. B, *infra,* p. 5a.)

cluded that "the reasoning of the First Circuit is persuasive." (App. B, *infra*, p. 5a.) The Colorado Supreme Court concluded:

> "To permit every witness who appears before a grand jury to file a motion to suppress and have it determined before he testifies would be to frustrate the grand jury process. Adequate protection is afforded the witness by the requirement that the Court examine all the facts before imposing a contempt sanction." (App. B, *infra*, p. 5a.)

Petitioner filed a timely petition for rehearing in the Colorado Supreme Court claiming that "the posture which this Court has apparently adopted may be construed as a determination that the rights of a grand jury take precedence over the rights of an individual even though the right in question is one guaranteed by the Constitution of the United States." The petition for rehearing was denied by the Colorado Supreme Court on March 12, 1973 (App. C, *infra*, p. 6a).

REASONS FOR GRANTING THE WRIT

I. There is Already Pending Before This Court a Substantially Identical Issue, on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. In Addition, the Decision of the Supreme Court of Colorado has Established a Conflict Between Decisions of a Highest State Court and a United States Court of Appeals Concerning a Substantial Federal Question Involving the Construction and Application of the Federal Constitution.

On February 20, 1973, this Court granted certiorari in *United States* v. *John P. Calandra*, No. 72-734, to review an issue which is substantially identical to the issue raised in the instant case.[8]

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[8] The *Calandra* case is awaiting argument next Term.

Calandra also involves the effort by a grand jury witness, for whom transactional immunity was to be made available, to obtain a hearing and ruling on a motion to suppress evidence seized, following the issuance of a warrant, allegedly in violation of Fourth Amendment rights. Like the initial decision by the District Court in the instant case, the federal district court held that Calandra was entitled to "litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the Constitutional protection against unlawful search and seizure." The court of appeals affirmed, holding that the District Court had properly entertained the suppression motion and that the Fourth Amendment exclusionary rule may be invoked by a grand jury witness as a bar to questioning based on an illegal search and seizure. The court discussed "the balance which must be struck" between "the interest of unencumbered inquiry and the efficient administration of justice" and "the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy". The court stated:

> "While the importance of the speedy and efficient administration of criminal justice must not be understated in this period of overloaded dockets, it is not at all clear that the procedure approved by [Federal District] Judge Battisti would unduly burden the functioning of the grand jury. Certainly, it was his view as a district judge that it would not.[9] We concur in that view. This is particularly so in the instant case as the alter-

[9] In the instant case, apparently, Chief Judge Horan, of the District Court, who impaneled the grand jury yet subsequently ordered a suppression hearing to be conducted (App. D, *infra*, p. 12a), was of the same view. (Footnote supplied.)

native to the procedure used below is the raising of the Fourth Amendment through a contempt proceeding, which would, it would seem, be more disruptive.

* * * * * * * * *

"Furthermore, it is important to emphasize that we deal with a fundamental constitutional claim[10] that is ripe. Calandra's right to privacy has been violated. As a direct result he finds himself before the grand jury to be asked questions which are the fruit of the intrusion upon his privacy. Given the immunity device, his claim is not one which will be vindicated in the criminal process. Absent the opportunity to raise the claim at this stage in the proceedings Calandra's opportunity for redress is severely limited and at the same time the very substantial incentive for law enforcement officials to combine the illegal search with a grant of immunity at the grand jury stage is unrestrained." (Pet. in No. 72-734, pp. 21, 23.)

The court of appeals also referred to the motivation underlying the Fourth Amendment's deterrence purpose by quoting from Justice Brandeis' opinion in *Olmstead* v. *United States,* 277 U.S. 438, as follows:

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole

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[10] This Court has referred to the Fourth Amendment in the following terms:

" 'The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment —is basic to a free society.' *Wolf* v. *Colorado,* 338 U.S. 25, 27. . . . This right has most recently received enunciation in *Camara* v. *Municipal Court,* 387 U.S. 523. 'The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' At 528." Mr. Justice Clark in *Berger* v. *New York,* 388 U.S. 41, 53.

(Footnote supplied.)

> people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy." (Pet. in No. 72-734, p. 22.)

The instant case involves the same interests and considerations as those currently before this Court in *Calandra,* and could, therefore, appropriately be reviewed at the same time. Moreover, it is respectfully submitted, by granting the writ here as well, the distinguishing facts of the instant case—a *state* grand jury witness seeking to suppress *wiretap* evidence—would serve to *assist* the Court in considering the common constitutional issue[11] within a desirably broad and timely framework. Indeed, as Mr. Justice Powell stated for the Court, last Term, referring to "the employment by Government of electronic surveillance":

> "There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens." (*United States* v. *United States District Court,* 32 L Ed 2d 752, 763.)[12]

And it has been forecast that the "legitimation" provided by title III of the Omnibus Crime Control and

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[11] These two factual distinctions do not, of course, affect the presence of the constitutional issue in the instant case. *Mapp* v. *Ohio,* 367 U.S. 643 (exclusionary rule enforceable against the States through the Fourteenth Amendment); *Katz* v. *United States,* 389 U.S. 347 (eavesdropping carried on by electronic means, with or without a physical intrusion, constitutes a "search and seizure" within the meaning of the Fourth Amendment).

[12] This Court has emphasized that the inherently broad intrusion of electronic eavesdropping makes the need for the Fourth Amendment's particularity requirements "especially great". *Berger* v. *New York,* 388 U.S. 41, 56.

Safe Streets Act of 1968[13] will increase the incidence of such intrusions at the state level. H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of Law and Order,* 67 Mich. L. Rev. 455, 477-480 (1969).

The Colorado Supreme Court's resolution of the federal constitutional issue, of course, conflicts with that of the United States Court of Appeals for the Sixth Circuit, in *Calandra.* It also conflicts with the views of two judges (Adams, Hastie, JJ.), who chose to reach the constitutional issue in *In re Egan,* 450 F.2d 199 (3d Cir. 1971), *aff'd* 408 U.S. 41,[14] and with the

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[13] P. L. 90-351, 18 U.S.C. §§ 2510, *et seq.*

[14] The Third Circuit in *In re Egan, supra,* held that Section 802 of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2515) establishes a rule of evidence permitting a grand jury witness to move to suppress wiretap evidence intercepted in violation of the statutory requirements. *Two judges (Adams, J. in an opinion joined by Hastie, C.J.) also relied separately on the Fourth Amendment* (as well as 18 U.S.C. § 2518(10)(a)). *In re Egan* was affirmed by this Court on the more limited basis of the civil contempt statute, 28 U.S.C. § 1826(a), respondents having already been subjected to contempt proceedings in that case.

With regard to the consideration of efficiency of grand jury investigations, there was stated the following in the two opinions for the majority of the court of appeals:

> "In the context of electronic surveillance, it is unlikely that hearings such as requested here would become a major interference with efficient grand jury investigations. Sister Egan is not asking that the grand jury be prevented from continuing its investigations or from returning an indictment against anyone found to have violated federal law. . . .
>
> "We assume that the Government will attempt to conduct surveillance within statutory and constitutional limits, and that only in a slight number of cases will there be a violation of the rules governing wiretapping. Thus, when the allega-

dictum of the D.C. Circuit in *In re Evans,* 452 F.2d 1239, 1246 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930. This conflict between a highest state court and a federal

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tion of illegal surveillance is made in most cases the Government will simply represent to the court that no electronic surveillance has been employed by the Government. In a lesser number of cases the Government will produce in court the warrant by which it proceeded, and a brief inquiry will demonstrate that the warrant was properly obtained and that the surveillance did not exceed the authority of the warrant. Only in a minimal number of cases do we expect that the Government will be found to have conducted surveillance in violation of the statute and in these cases the hearing will not be overly complicated or lengthy, because the primary matter of inquiry would be whether the Government can demonstrate an independent basis, aside from the illegal surveillance, upon which to justify the questions propounded before the grand jury." 450 F.2d at 216 (Opinion of Adams, J.)

• • •

"I do not believe that the countervailing costs in the form of possible interference with grand jury procedures, will outbalance these benefits. Only a very small percentage of witnesses called before grand juries are hostile to the government's case. Even if all future hostile witnesses stand mute and raise a Section 2515 issue, presumably there will have been no wiretaps at all in a very high percentage of those cases, and a contempt hearing will take no longer than the prosecutor's representation to that effect. Only where there actually has been a wiretap will a hearing be in any way extended. In those instances where the wiretap has been duly authorized, the hearing should generally be relatively brief. I would expect that the percentage of unauthorized wiretaps will be extremely low, especially under the rule we adopt, and that the need for extended hearings will be proportionately slight. In the unlikely event, however, that the number of such cases is higher than I expect, the increased burden on the operation of grand juries will be more than offset, in my opinion, by the increased need for a prophylactic rule which such a disregard for the law would evidence." 450 F.2d at 220-21 (Opinion of Rosenn, J.)

court of appeals [15] further warrants review of the Colorado Supreme Court's decision.

II. By Virtue of the Decision Below, a Highest State Court, by a Divided Vote, has Decided a Federal Question of Substance not Heretofore Determined by this Court in a Manner Inconsistent in Principle with Decisions of this Court in Hale v. Henkel, 201 U.S. 43, Silverthorne Lumber Co. v. United States, 251 U.S. 385, and United States v. Dionisio, —— U.S. ——, 35 L Ed 2d 67.

Although this Court's decision last Term in *Gelbard* v. *United States,* 408 U.S. 41, expressly refrained from reaching the constitutional issue presented by the instant case.[16] the decision by the Colorado Supreme Court conflicts in principle with prior decisions of this Court.

In *Hale* v. *Henkel,* 201 U.S. 43, the Court recognized the standing of a *grand jury* witness to attack the validity, under the Fourth Amendment, of a *subpoena*

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[15] Other federal courts of appeals have indicated their agreement with the result reached by the Colorado Supreme Court although in each case, either the facts are distinguishable from those here or there is no consideration, in the court's opinion, of the constitutional issue. *Cali* v. *United States,* 464 F.2d 475 (1st Cir.); *United States* v. *Flood,* 394 F.2d 139, 141 (2d Cir.), *cert. denied,* 393 U.S. 855; *Truchinski* v. *United States,* 393 F.2d 627, 631-34 (8th Cir.), *cert. denied,* 393 U.S. 831; *United States* v. *Gelbard,* 443 F.2d 837 (9th Cir.), *reversed and remanded,* 408 U.S. 41.

[16] In *Gelbard* the Court held that a grand jury witness has a statutory defense to a contempt citation for refusing to answer questions, if the questions are based upon illegal electronic surveillance. The Court stated (408 U.S. at 45, n. 5):

> "In view of our disposition of these cases, we do not reach any of the constitutional issues tendered as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions."

duces tecum. Referring to the subpoena, the Court stated:

> "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. . . . Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. . . . A general subpoena of this description is equally indefensable as a search warrant would be if couched in similar terms." 201 U.S. at 76.

Another case involving grand jury subpoenas was *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385. In that case, the lower court had, upon an application for the return of governmentally-seized books and records, ordered them returned, agreeing that they had been seized in violation of the Fourth Amendment, but had then ordered the victim to produce the same material pursuant to a grand jury subpoena. Upon refusal to obey such subpoena and the lower court's production order, on Fourth Amendment grounds, Silverthorne was held in contempt. The Supreme Court (per Justice Holmes) reversed, stating:

> *"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."* 251 U.S. at 392. (Emphasis added.)

"This language would logically appear to mean that the Fourth Amendment prevents the government from using illegally seized evidence as the basis for questioning aggrieved parties before a Grand Jury." *In re Egan, supra,* 450 F.2d at 211. The reasoning and rationale of *Silverthorne* have recently been affirmed

by this Court in *Harrison* v. *United States,* 392 U.S. 219, 222, 231.

In *United States* v. *Dionisio,* decided this Term, — U.S. —, 35 L Ed 2d 67, (January 22, 1973), the Court considered on the merits the Fourth Amendment claim of a grand jury witness adjudged in contempt for refusal to furnish voice exemplars for identification purposes. And while the Court rejected the claim,[17] the rationale is illuminating:

> "Since neither the summons to appear before the grand jury, nor its directive to make a voice recording, infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirements of 'reasonableness' imposed by the Court of Appeals. . . . Since Dionisio raised no *valid* Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any Constitutional or statutory privilege, declined to answer a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any *such* interference with grand jury proceedings." 35 L Ed 2d at 80. (Emphasis added.)[18]

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[17] on the ground that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, i.e., his physical characteristics or his handwriting, inasmuch as no intrusion into an individual's privacy results from the exposure of such matters.

[18] While the Court referred to the need for broad grand jury investigative power (35 L Ed 2d at 79), and the concern at impeding such investigations (35 L Ed 2d at 81), it recognized the controls and limitations to which these interests are subject:

> "This is not to say that a grand jury subpoena is some talisman that dissolves all Constitutional protections. The

Implicitly, it would seem, had a *valid* Fourth Amendment claim been raised, Fourth Amendment reasonableness requirements would have had to be met before the grand jury would have been entitled to the evidence.

Thus, *Dionisio* appears to recognize the applicability of the exclusionary rule for valid Fourth Amendment claims raised in grand jury proceedings. The decision below by the Colorado Supreme Court is not in ac-

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grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. . . . The Fourth Amendment provides protection against a grand jury subpoena duces tecum tooo sweeping in its terms 'to be regarded as reasonable.' *Hale* v. *Henkel*, 201 U.S. 43, 76; cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not toletrate the transformation of the grand jury into an instrument of oppression: '. . . Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.' *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708. . . .

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"The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon *the legitimate rights* of any witness called before it." 35 L Ed 2d at 78, 81. (Emphasis added.)

cord.[19] For this additional reason, review of that decision would be appropriate.[20]

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[19] Unlike the instant case, and *Calandra, supra,* neither *Hale, Silverthorne,* nor *Dionisio* involved witnesses offered immunity under the Fifth Amendment. But, just as the trustworthiness of evidence is irrelevant to its admissibility status under the Fourth Amendment, (*Davis* v. *Mississippi,* 394 U.S. 721, 724), so too is the immunity factor. "It is surely anomalous to say that the individual . . . is fully protected by the Fourth Amendment only when the individual is suspected of [or may be charged with] criminal behavior." *Camara* v. *Municipal Court,* 387 U.S. 523, 530. Whereas the Fifth Amendment is specifically directed to the criminal defendant, the Fourth Amendment is directed at the proscribed act itself. Society as a whole is protected and the victim of an illegal search and seizure is an appropriate representative of the larger interests as well as his own. And it is precisely because such representative may be granted immunity from further prosecution that society's interest in redress to reduce the incentive of the government to violate Fourth Amendment rights will not be vindicated unless this aggrieved party—with the necessary standing under *Alderman* v. *United States,* 394 U.S. 165—may raise the claim in the course of a grand jury proceeding. See *In re Egan, supra,* 450 F.2d at 213. One court has stated, "it is a truism that the deterrent is strengthened by extending the exclusionary rule to grand jury proceedings while they are in progress." *In re Shead,* 302 F. Supp. 569, 571 (N.D. Cal.), *affd, Carter* v. *United States,* 417 F.2d 384 (9th Cir.), *cert. denied,* 399 U.S. 935.

[20] As indicated by paragraph 2. of the "Questions Presented", *supra,* petitioner seeks consideration—as he did in the proceeding below—of alternative remedies to vindicate Fourth Amendment rights in the event it should be decided that the exclusionary rule does not apply and the suppression remedy is unavailable. Petitioner would argue that "in the context of electronic surveillance, it is unlikely that hearings such as requested here would become a major interference with efficient grand jury investigations" (see *supra,* pp. 12-13, 15-16 n. 14). As a last resort, in lieu of such "hearings", petitioner would request the immediate availability of the record in the wiretap authorization proceeding such as that which would otherwise be made available to him as a defendant in a subsequent contempt proceeding. At least, by this

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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remedy, the witness will more effectively be able to choose—upon advice of counsel—between testifying and being cited for contempt, without at the same time delaying the grand jury investigation.

Moreover, we would seek to show that relegation of petitioner to raising his claim in a contempt proceeding—a statutory remedy already recognized in *Gelbard, supra*—does not befit the Fourth Amendment privilege, unnecessarily negates the deterrence purpose thereof, and—by subjecting the witness to social stigma and "the revolving door which would bring him back here raising the same issues in a defense to a contempt citation" (*In re Calandra*, 332 F. Supp. 737, 739 (N.D. Ohio); Pet. in No. 72-734, p. 30)—result in unfairness and inefficiency.